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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 549

CHARLES D. CLARK, Relator (On the Relation of Colquitt Clark),

Petitioner,

vs.

J. F. BRYSON, Sheriff of Tom Green County, Texas

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 549

EX PARTE CHARLES D. CLARK,

Relator.

(ON THE RELATION OF COLQUITT CLARK)

PETITION FOR WRIT OF CERTIORARI

To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

Summary Statement of the Matter Involved

This is a habeas corpus case presented to and filed with the Court of Criminal Appeals of Texas as an original application in accordance with the procedure prescribed by the *Texas Code of Criminal Procedure, Article 119,* as amended by the *Acts of 1943,* 48th Legislature, p. 354, Ch. 233, Sec. 1.

The Court of Criminal Appeals of Texas summarily refused the Application for Writ of Habeas Corpus without a hearing on the facts, and without the issuance to respondents a show cause order why the writ of habeas corpus should not be granted.

Applicant (the party for whose benefit the relief is sought is so designated by Article 125, Texas Code of Criminal Procedure, 1925, and will be so referred to in application, as well as referred to as petitioner) was finally convicted of murder, and on the 9th day of December, A. D. 1953, was sentenced by the District Court of Tom Green County, Texas, to suffer the penalty of death on the 14th day of January, A. D. 1954. (Record, p. 60.)

The applicant on the 9th day of December, A. D. 1953, was surrendered by the respondent, J. F. Bryson, Sheriff of Tom Green County, Texas, to the respondent, H. E. Moore, warden of the State Penitentiary at Huntsville, Texas, for execution of the sentence, and applicant is now in the custody of and is restrained by the latter respondent.

Texas Code of Criminal Procedure, Article 119, as amended, provides,—"*After final conviction* in any felony case the writ must be made returnable to the Court of Criminal Appeals of Texas at Austin, Texas." (Italics ours.) The procedure in such case has been approved and set out by the Court of Criminal Appeals in *Ex parte Johnson*, 153 Tex. Cr. Rep. 619, 224 S. W. (2) 240. Applicant followed the approved practice in presenting this application.

The Court of Criminal Appeals of Texas has original jurisdiction on habeas corpus under *Article V, Sec. 5, of the Constitution of Texas.* The Court of Criminal Appeals has recently held in *Ex parte Willis*, 259 S. W. (2) 190, not yet officially reported, that it will not take evidence on original habeas corpus proceedings in absence of substantial allegations raising a question which would warrant relief prayed for, if settled according to relator's contention. Since habeas corpus is a writ of right, the refusal of this application by the Court of Criminal Appeals can only be construed as a holding that applicant's sworn application taken as true presents no grounds to justify the granting of the writ.

Applicant's application for a writ of habeas corpus is based upon Federal grounds, and presents the Federal question that this petitioner was denied due process of law under the XIV Amendment to the Constitution of the United States in his trial in the case in which he was convicted of murder and given the death penalty. The case in which his conviction was affirmed is cause number 26,141, in the Court of Criminal Appeals of Texas, reported as *Clark* v. *Texas*, 261 S. W. (2) 339, not yet officially reported, *certiorari refused by the Supreme Court on application number 232, October Term, 1953, October 19, 1953, 98 L. ed. 57.*

The printed record in that case, of which the Court will take judicial notice, is on file with the Supreme Court in said proceedings. The matters presented in this petition were not of record in the former review and have not been passed upon by any court, except by the action of the Court of Criminal Appeals in summarily refusing this application for a writ without a hearing.

The Federal questions presented by petitioner in his application for habeas corpus are as follows:

1. In the trial of his case in Tom Green County, Texas, the rights of the defendant and his interests were so flagrantly violated by his trial counsel, James H. Martin and Newton Kennedy, as to shock the conscience of this court and as to deprive defendant of effective aid of counsel and deny him due process of law under the XIV amendment to the Constitution of the United States.

The sordid and disgraceful conduct of trial counsel in this case is set forth in the application for habeas corpus, and will be specifically referred to in the statement in the brief attached to this application.

It is well settled that if a defendant's counsel was so negligent or incompetent that defendant was deprived thereby of a valid defense or suffered the imposition of a

penalty of death, a constitutional question is presented. See: *United States* v. *Handy*, 203 Fed. (2) 407, l.c. 417; and *United States* v. *Wight*, 179 Fed. (2) 376, l.c. 379.

Particularly is this true in a case of this kind where it appears the defendant's counsel was guilty of fraud toward defendant and guilty of bad faith in his dealings and negotiations with the attorney for the prosecution.

2. In the trial of his case in Tom Green County, Texas, the prosecution, unknown to defendant and his counsel, knowing suppressed the testimony of and information from the witnesses, S. M. Hankins, Tomas Menchaca, and Dr. Jack Wilhelm, that, only a few hours before the homicide, he the said doctor, treated the defendant and gave him (defendant) an opiate which would have rendered defendant incapable of knowing what he was doing for approximately forty-eight hours.

It was defendant's contention that he had no recollection or knowledge of what occurred the night of the homicide.

The prosecuting attorney knowing that Dr. Wilhelm's records showed that he had visited defendant the night of the homicide and administered a heavy dose of drug, never-the-less permitted proof by the witness, Hankins, that the doctor's visit was on Monday, two days before the homicide.

Also the prosecution knew that the witness, Tomas Menchaca, if asked, would have testified that the doctor visited the defendant a few hours before the homicide and administered medicine to defendant to quiet him. The witness told the district attorney this fact, but the district attorney told the witness not to testify to this fact, but to testify only to what he was asked about. The district attorney suppressed this material evidence in the case. See: *Mooney* v. *Holohan*, 294 U. S. 103, 55 S. Ct. 340, 79 L. Ed. 791.

3. In the trial of his case in Tom Green County, Texas,

unknown to defendant and his attorney, the prosecuting attorney suppressed a letter written by defendant soon after the homicide to his brother, which letter was intercepted by the prosecution from the postal authorities, and which the district attorney knew to be material and exculpatory; and defendant and his attorneys have been unable to learn the contents of said letter. On suppression of testimony, see: *Mooney* v. *Holohan*, 294 U. S. 103, 55 S. Ct. 340, 79 L. Ed. 791.

Jurisdictional Statement

The Supreme Court of the United States has jurisdiction of this case under 28 U. S. C. 1257(3), by Writ of Certiorari to The Court of Criminal Appeals of Texas, the highest State Court, from the final judgment of said court rendered December 8, 1953 and December 16, 1953.

Relator's application was first presented to The Court of Criminal Appeals on December 5, 1953, and refused by that Court on December 8, 1953; and because of change of custody of the applicant (R. 53) was re-presented to the Court on December 15, 1953, and again refused on December 16, 1953 (R. 60, 60a, 62 and 62a).

This petition for writ of certiorari is presented to the Supreme Court within ninety days from both final judgments aforesaid as required by Supreme Court Rule 38½, adopted November 15, 1948, and 28 United States Code, Sec. 2101(c) and (d).

The Supreme Court has jurisdiction to review by certiorari the final judgment of The Court of Criminal Appeals refusing an application for writ of habeas corpus.

In *Craig* v. *Harney*, 331 U. S. 367, 67 S. Ct. 1249, 91 L. Ed. 1546, the Supreme Court reviewed by certiorari the final judgments of The Court of Criminal Appeals of Texas in refusing an application for habeas corpus, and reversed the Texas Court.

In *Fisher* v. *Pace, Sheriff*, 336 U. S. 155, 69 S. Ct. 425, 93 L. Ed. 569, the Supreme Court reviewed by certiorari the final judgment of the Supreme Court of Texas in refusing an application for habeas corpus, and affirmed the Texas court.

In the *Craig* case the Supreme Court said:

> "In a case where it is asserted that a person has been deprived by a state court of a fundamental right secured by the Constitution, an independent examination of the facts by this Court is often required to be made." Citing numerous cases from the Supreme Court (l.c. 331 U. S., p. 373-4).

The petitioner has exhausted his remedy in the State Court (*Mooney* v. *Holohan, supra*), and by this petition for certiorari is pursuing his right of review from the refusal of his application for habeas corpus by the highest State Court, as required by the decision of this Court. See: *Darr* v. *Burford*, 339 U. S. 200, 70 S. Ct. 587, 94 L. Ed. 761.

The necessity for petitioner to pursue his remedy from the decision of the highest state court by petition for certiorari to the Supreme Court of the United States is not dispensed with because the Court of Criminal Appeals denied petitioner's application for habeas corpus without granting a hearing or filing an opinion. See: *Darcy* v. *Heinze* (C.A. 9th), 194 Fed. (2) 664, cert. den. 343 U. S. 943, 72 S. Ct. 1037, 96 L. ed. 1348.

The common-law writ of *coram nobis* and right to re-open a final conviction in a criminal case does not exist in Texas. See: *Ex parte Massey*, 249 S. W. (2) 599, not yet officially reported; and *Ex parte McCune*, 246 S. W. (2) 171, not yet officially reported.

The matters of fact involved in the application for habeas corpus in this case were not involved in the appeal by defendant in the principal case in which defendant (applicant) herein was convicted and sentenced to death, which

case was affirmed, and certiorari refused by the Supreme Court.

But all of the matters presented herein lie and arose outside of the record in the main case, and could not have been assigned and presented in that case, and applicant now presents them in his application for habeas corpus as facts *de hors* the record in the main suit which denied him a fair trial and denied him due process of law in his trial and conviction. These matters could not have been preserved in the record in the main case, because they involve largely the conduct of the defense attorney who was making that record (See *dissent, Justice Jackson, Brown* v. *Allen*, 344 U. S. at pp. 346-347.).

No previous application for habeas corpus has been made by petitioner to any court.

The Questions Presented

1. The first question presented is that, in the trial of the main case in which petitioner was convicted and sentenced to the death penalty, defendant's attorneys were guilty of fraud and bad faith toward him, and in their dealings with the prosecuting attorneys, and that in their conduct of the said trial and defendant's defense so failed to meet the standard of effective aid of counsel, as to constitute the proceedings a mockery and a farce, and to constitute no trial and defense at all, and to deny defendant due process of law under the XIV Amendment to the Constitution of the United States.

The following facts appear from petitioner's application for habeas corpus sworn to by his brother, Colquitt Clark, and which, as there was no hearing permitted, must be taken as true:

(1). The principal defense of the defendant on his trial was that he was a person of unsound mind, and at the very

time of the alleged offense, his mind was so deranged that he did not understand the nature and consequence of his acts, and did not know the difference between right and wrong, and that he had no recollection and no knowledge of what occurred with reference to the facts alleged in the indictment against him. (R. 4.)

(2). Shortly after the commission of the offense, two attorneys, of Dallas, Texas, two hundred miles from San Angelo, the city of the trial, undertook the defense of the case. They charged the sum of $25,000.00, which sum was to cover all expenses of the trial, expressly agreeing to employ local counsel to assist in the defense. Also they agreed to secure and pay for the services of at least two qualified medical experts and psychiatrists to examine the defendant and determine his mental condition. Defendant paid this fee by execution of a secured deed of trust note. (R. 4.)

(3). The attorneys did not secure or use the services of local counsel on the trial (R. 9), although one of San Angelo's leading attorneys was employed as special prosecutor. (R. 7.)

(4). Although said attorneys contended that defendant was insane, and this was their only defense, they did not have defendant examined, as they agreed, by any doctor or psychiatrist; and made no effort to obtain any medical testimony. (R. 5-6.)

(5.) If said attorneys had had defendant examined by competent alienists, said alienists would have found defendant insane, and to have been insane at the time of the alleged offense. The only alienist who has examined defendant, and did so after the conviction, would so testify. (R. 6; also Exhibit "CC", R. 29-33.)

(6). The defendant's attorneys made no preparation for the trial, and did not consult defendant's brother, but ap-

peared in court forty-two days after the offense and announced ready for trial. (R. 7.)

Although extensive newspaper publicity had aroused the passions of the citizens of Tom Green County, (See Exhibit D, R. 26.), where the case was tried, and sufficient time had not elapsed for the passions to subside, and though the special venire was exhausted because a large majority expressed an opinion, defendant's attorneys did not ask for a continuance, and did not apply for a change of venire, as permitted by law and required by the circumstance under any reasonable view of the facts. (R. 7-8.)

Although it appeared that there was a combination of influential persons in the county seeking defendant's conviction, defendant's counsel did not seek or apply for a change of venue. (R. 7-8.)

(7). It was the attorneys' for the defendant position that the defendant was insane at the time the alleged offense was committed as a result of the conduct of his wife, who was a narcotic addict, and as a result of her conduct in connection with certain dope peddlers. There was evidence existing and available establishing these facts beyond a reasonable doubt, but defendant's attorneys made no effort to establish these facts by any testimony on the trial, but merely raised suggestions by questions to the defendant when he was on the stand and by slurs and inferences. (R. 8; see also Exhibits E, R. 34; F, R. 36; G, R. 38; H, R. 39; I, R. 40; J, R. 42; K, R. 43; L and M, R. 44-45; N, R. 47; O, R. 48; P and Q, R. 49 and 51; R, R. 52; S, R. 54.)

The witnesses, Mr. and Mrs. Walcott, (Exhibits P and Q, R. 49-51), would in particular have testified to the conduct of the deceased while married to defendant in appearing before their guests completely nude. Defendant's attorney told these witnesses not to testify to these facts because he had agreed with the district attorney not to prove them.

(8). It was defendant's attorneys' position that defendant had no recollection of anything that occurred the evening and night of the homicide. The state permitted it to be proved by the witness, S. M. Hankins, that two days before the homicide he called in Dr. Wilhelm to treat defendant at the request of defendant's wife and that the doctor gave defendant an opiate by injection. (R. 14.)

The truth was that this occurred between 8 and 9 o'clock the very night of the homicide, and that the doctor's records reflected this fact. The doctor, if asked, would have testified that a few hours before the homicide he gave defendant sufficient drug to render him incapable of knowing what he was doing for forty-eight hours. (R. 14; Exhibit U, R. 58-59.)

The state's witness, Tomas Menchaca, knew of the doctor's visit and treatment on the night of the homicide, but under the instruction of the district attorney did not testify about this or reveal it to defendant's counsel. (R. 15; Exhibit T, R. 56.)

If defendant's counsel had properly interviewed the witnesses, Dr. Wilhelm, Hankins, and Menchaca, he would have learned the true facts as to the date of the administering the drug, and such testimony would have constituted a complete defense for defendant.

(9). Defendant's attorneys had a promissory note for their fee in the amount of $25,000.00, secured by a mortgage on defendant's interest in his hotel worth $250,000.00, with a small first lien against it.

The special prosecutor for the state was also attorney for defendant's partner in the hotel. Said partner was also a state witness in the case. Defendant's attorneys in order to collect their attorneys fee throughout the entire trial carried on negotiations with the special prosecutor to sell defendant's interest in the hotel to the said client of the special prosecutor, and state witness. On the day the jury

returned the death verdict in the case, after defendant was returned to jail, defendant's attorneys came to the jail with a deed for defendant's signature conveying defendant's interest in his hotel to the client of the special prosecutor, Bill Volkman, who was also a witness for the state in the main case. (See Record in *Clark* v. *Texas,* Cause 232, October Term, 1953, in this Court, p. 113.). This witness and ultimate purchaser of the hotel testified upon the main case as a state's witness that defendant in his opinion was of sound mind. Defendant knew nothing of the negotiations and asked the terms of the sale. Defendant's attorney stated that the consideration was unimportant; that the attorneys had to be paid their note, or they would withdraw from the case and there would be no appeal; and that defendant would be executed in thirty days; and the only way to pay the note was to sell the hotel. Under such coertion defendant signed the deed, but it was not acknowledged as no notary was present. (R. 16-18.)

A few days later Mr. Hankins an employee of the hotel brought defendant $13,000.00, which he stated was the balance due defendant on the sale. (R. 17.) Relator, Colquitt Clark, understands that defendant's attorneys took $25,000.00 in payment of their note; $4,500.00 additional as attorney's fees in representing defendant in his uncontested divorce suit; and that $15,000.00 was paid to special prosecutor for the mother of the deceased to settle a civil suit for the wrongful killing of defendant's wife, of which suit defendant had no knowledge. (R. 18.)

Petitioner's attorneys in the trial of the main suit, never at any time rendered him an accounting for the money from the sale. (R. 18.)

In addition defendant's attorneys during the trial, while he was in jail, took his automobile and converted it, and have never rendered him an accounting for it. (R. 5; and R. 18.)

2. The second question presented is that the prosecuting attorney knowingly (and without the knowledge of defendant or his counsel) withheld and suppressed the material evidence in the case that, on the night of the homicide, a few hours before it occurred, Dr. Wilhelm visited defendant in his hotel room and administered a combination of opiate and barbiturate of high potency which was calculated to render defendant unconscious and irresponsible for his acts for a period of forty-eight hours; and that such suppression of evidence of defendant's material and essential defense denied him due process of law under the XIV Amendment to the Constitution of the United States.

The prosecuting attorney knew from the witnesses, Menchaca and Dr. Wilhelm, the facts with reference to the administering of the drugs to defendant on the night of the homicide. These facts were unknown to defendant and his counsel. Yet the prosecution permitted it to be proved by the witness, Hankins, that this occurred two nights prior to the homicide. (R. 14-16.)

3. The third question presented is that the prosecuting attorney, unknown to defendant and his counsel, intercepted and suppressed a letter written by defendant on the night of the homicide to defendant's brother, Colquitt Clark, the contents of which are unknown to affiant, but which was material to defendant's defense; and that the suppression of such evidence denied defendant due process of law under the XIV Amendment to the Constitution of the United States. (R. 3.)

The Reasons Relied On for the Allowance of the Writ

Petitioner has set forth from the Record the facts under the three federal questions presented by this petition for writ of certiorari.

1. The manner in which defendant's case was tried by his attorneys violated every known standard for gauging effective aid of counsel and this conduct of the attorneys was accompanied by the acts of the attorneys in defrauding him of his hotel for the purpose of collecting their fee. The negotiation of the sale of the hotel occurred during the trial between defendant's attorneys and the special prosecutor. An examination of the sworn application for habeas corpus shows that the attorneys were wholly indifferent to his rights and the essential steps of his defense, and were interested in only one thing, collecting their fee through negotiations with the special prosecutor, the consummation of such negotiations depending upon defendant's conviction. In order to consummate the sale to the client of the special prosecutor, defendant's attorneys, without authority from defendant, paid to the special prosecutor and another client $15,000.00. No accounting was ever rendered defendant. His attorneys took $29,500.00 in cash out of the sale, paid to them by the client of the special prosecutor. They took defendant's automobile and converted it. Because of the manner in which they defended his case, they gave him the death penalty.

If the defendant had been acquitted on the ground of insanity, the sale of the defendant's hotel could not have been made, and the attorneys would not have been able to collect their money. Their note and mortgage would not have been a valid obligation. If he were insane, they could not have kept his automobile. Their every interest lay in securing defendant's conviction. Volkman, the purchaser of the hotel, and the client of the special prosecutor, as a witness for the state testified defendant was sane. Attorneys made no effort to show his bias, resulting from his efforts and intention to purchase defendant's interest in

the hotel. Said attorneys made no effort to establish their contention that defendant was insane at all. Every step they took insured his conviction and invited a penalty of death.

Justice Minton, while on the Court of Appeals, said in *Weber* v. *Ragen*, *(7th Cir.)*, *176 Fed. (2) 579, l. c. 586:*

"As to the requirements under the Fourteenth Amendment, the services of counsel meet the requirements of the due process clause when he is a member in good standing at the bar, *gives his client his complete loyalty, serves him in good faith to the best of his ability*, and his service is of such a character as to preserve the essential integrity of the proceedings as a trial in the court of justice." (Italics ours.).

The matters presented here are not matters of mistake of judgment, or questions of strategy. But the attorneys in this case failed to do those essential things which all attorneys will agree should have been done.

Defendant's attorneys went into a strange town, charged an adequate fee, agreed to employ local counsel, yet went to trial without local counsel. Would any court or lawyer say that their breach of their agreement in failing to hire local counsel was a mere mistake of judgment?

Defendant's attorneys contended that defendant was insane. They agreed to have him examined by alienists. But aside from their agreement, would any honest lawyer raise the defense of insanity and not have his client examined by a doctor, and not offer the available evidence of his insanity? Was such conduct a mistake of judgment?

The case was tried forty-two days after the alleged offense while the passion of the local citizens was aroused by newspaper publicity. The defendant's attorneys did not seek a continuance or change of venue. See: *United States* v. *Handy*, 203 Fed. (2) 407.

Attorneys for petitioner in this application conceive the

law to be that defendant upon his trial was "entitled to be competently defended by counsel learned in the law. Though questions of degrees of competency and learning may always be present there is assuredly a level below which the court-room performance of counsel representing a defendant in a capital case may not sink or the Fourteenth Amendment will be encountered". If Clark's "counsel was so negligent or incompetent that he was deprived thereby of a valid defense or suffered imposition of a penalty of death, a constitutional question is presented". The quoted language is taken from the opinion in *United States* v. *Handy*, 203 Fed. (2) 407, l. c. 417. And the opinion says in that case: "Nor should it be deemed to be a pertinent distinction that the defendant's counsel is selected by himself or by members of his family or friends rather than appointed by the court", citing *Sanchez* v. *State*, 199 Ind. 235, 157 N. E. 1.

Defendant, Clark, in our case, had a complete defense under the law, that at the time of the homicide he was under the influence of drugs, not voluntarily taken by him, to an extent that he did not know what he was doing, and did not know the difference between right and wrong. While this information was available from the witnesses, Menchaca and Dr. Wilhelm, defendant's attorneys made no effort to ascertain the facts or to bring out and present the facts.

2. Under the second and third grounds, petitioner contends that the suppression of the material evidence by the prosecuting attorney brings the case under the rule of *Mooney* v. *Holohan*, 294 U. S. 103, 55 S. Ct. 340, 79 L. Ed. 791; and *2 Wigmore, Evidence* (3rd Ed.), Sec. 278; and *Morton* v. *United States*, 147 Fed. (2) 28, l. c. 31.

Mr. William D. Mitchell, sometime Attorney General of the United States, and one of our nation's most esteemed, as stated by Justice Frankfurter in *Brown* v. *Allen*, supra, (344 U. S., at p. 511), in a Department of Justice release, for April 8, 1929, said:

"Detention and punishment of crime must be effected by strictly lawful methods. Nothing has a greater tendency to beget lawlessness than lawless methods of enforcement. The greater the difficulties of detecting and punishing crime, the greater the temptation to place a strained construction on statutes to supply what might be thought to be more efficient means of law enforcement. The statutory and constitutional rights of all persons must be regarded, and their violation, inadvertent or otherwise, is to be avoided."

While a prosecuting attorney may select his testimony and witnesses in order to present as strong a case as possible, and to establish the truth from sifting the material testimony, he may not suppress material testimony, which, if true, and if believed by the jury, would absolve the defendant of guilt.

Defendant's alleged offense was difficult to explain, as the act of a rational man, unless he was a homicidal fiend, of which there was no evidence. The prosecution had in its hands at the trial undisputed proof that defendant, at the time of the homicide, was under the influence of heavy opiates. This would have explained his conduct, and his lack of memory, but it also would have established his innocence. The prosecution knowing this deliberately suppressed the evidence and directed the witness, Menchaca, not to testify to it.

A deliberate deception of the court and jury by the presentation of testimony known by the prosecution to be false is inconsistent with the rudimentary demands of justice and is within the purview of the Fourteenth Amendment. See: *Mooney* v. *Holohan, supra.*

Prayer

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to The

Court of Criminal Appeals of Texas; and that the judgment of the Court of Criminal Appeals be reversed by this Court, and that this cause be remanded to The Court of Criminal Appeals of Texas directing that it entertain petitioner's Application for Habeas Corpus, and issue a show cause order to the respondents, and hear such application on the facts and merits, as by the statutes in such cases provided, and for such other relief as to this Court may seem proper.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 549

EX PARTE CHARLES D. CLARK, PETITIONER,
(ON THE RELATION OF COLQUITT CLARK)

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Opinion Below

The Court of Criminal Appeals of Texas refused to hear petitioner's application for writ of habeas corpus, and refused the application summarily, and wrote no opinion. (R. 60; 62; and 62a.)

Jurisdiction

The Supreme Court of the United States has jurisdiction under 28 U.S.C. 1257 (3), the petitioner herein claiming rights, privileges, and immunities under the Constitution of the United States. This petition is filed to revew the final judgment and decree of The Court of Criminal Appeals of Texas, and is filed in this Court within ninety (90) days from the final judgment and decree of the State Court, as provided by Supreme Court Rule 38½, and Title 28, United States Code, Sec. 2101, sub. (c) and (d).

The petitioner presented his application for writ of habeas corpus to The Court of Criminal Appeals presenting federal questions of due process of law in the trial, conviction, and assessment of the death penalty, in the criminal prosecution of petitioner for murder in the case of *Clark* v. *State of Texas, 261 S. W. (2) 339,* certiorari refused by this Court, October 19, 1953, *98 L. ed. 57.*

Petitioner has stated the facts with reference to the filing of the application for habeas corpus and the action of the state court thereon at pp. 4-6 of his Petition for Certiorari, and reference is made thereto without restatement here.

The Supreme Court of the United States has jurisdiction to review the action of the highest state court in refusing an application for habeas corpus. See: *Craig* v. *Harney, 331 U. S. 367, 67 S. Ct. 1249, 91 L. ed. 1546;* and *Fisher* v. *Pace, Sheriff, 336 U. S. 155, 69 S. Ct. 425, 93 L. ed. 569;* and the Supreme Court will make an independent examination of the facts in a case where it is asserted that a person has been deprived by a state court of a fundamental right secured by the Constitution to determine whether or not a federal right has been denied. See: *Craig* v. *Harney, supra, 331 U. S., pp. 373-4).*

Where applicant's petition for habeas corpus has been refused by The Court of Criminal Appeals, he is not required to present it to some other Court having power to grant it (See: *Brown* v. *Allen,* 344 U. S. 443, 97 L. ed. 469); but since the overruling of *Wade* v. *Mayo, 334 U. S. 672, 68 S. Ct. 1270, 92 L. ed. 1647* by this Court in *Darr* v. *Burford, 339 U. S. 200, 70 S. Ct. 587, 94 L. ed. 761,* applicant for habeas corpus in a state court must pursue his remedy by petition for certiorari to the Supreme Court of the United States.

An applicant may not resort to a federal district court

for habeas corpus to vindicate a federal right until he has first pursued the remedies available to him in the state courts. See: *Mooney* v. *Holohan, 294 U. S. 103, 55 S. Ct. 340, 79 L. ed. 791.*

Petitioner's sworn application for habeas corpus shows that petitioner in his trial and conviction in the main case was denied a fair trial and due process of law, because of the fraud, bad faith, and culpable incompetence of his attorneys on the trial; and because of the deliberate and knowing suppression by the prosecution of material evidence in the case that deprived defendant of a substantial and absolute defense in the case. The facts are detailed in the Petition for Certiorari, together with a reference to pertinent authorities, and will not be restated here.

These facts and authorities show that The Court of Criminal Appeals of Texas has refused petitioner a hearing and his day in court to present serious questions of lack of due process in his trial in the main case. Petitioner's only remedy from this action of the State Court is by review by petition for writ of certiorari in the Supreme Court.

Statement of the Case

A statement of the material facts contained in the Application for Writ of Habeas Corpus have been detailed in the Petition for Writ of Certiorari, at pp. 7-11, which is here adopted and made part of this brief.

Additional statement of facts and references to the Record will be made in connection with the argument under the errors relied upon.

Error Relied Upon

The Court of Criminal Appeals erred in summarily refusing without a hearing petitioner's application for writ of habeas corpus, and in not issuing a show cause order to

respondents, and not setting said application down for a hearing, because:

(1). Petitioner's sworn application for writ of habeas corpus shows that petitioner, in the trial of the main case in which he was convicted and assessed the death penalty, was denied effective aid of counsel and due process of law under the Fourteenth Amendment by the fraud and bad faith of his attorneys on the trial in their deals with the attorney for the prosecution, and the failure of defendant's attorneys in the trial of said case to meet the minimum standards required to prevent said trial from being a mockery and farce.

(2). Petitioner's sworn application for writ of habeas corpus shows that petitioner, in the trial of the main case in which he was convicted and assessed the death penalty, was denied a fair trial and due process of law under the Fourteenth Amendment by the prosecuting attorney knowingly suppressing the evidence that a few hours before the homicide Dr. Wilhelm treated defendant and administered to him opiates of such high potency as to render defendant incapable of knowing what he was doing for a period of forty-eight hours, and in permitting the testimony of witness, S. M. Hankins, which the prosecuting attorney knew to be false, that Dr. Wilhelm treated defendant two days before the homicide.

(3). Petitioner's sworn application for writ of habeas corpus shows that petitioner, in the trial of the main case was denied a fair trial and due process of law under the Fourteenth Amendment by the prosecuting attorney intercepting and suppressing the letter written the night of the homicide by defendant to his brother, which was material to defendant's defense.

Argument Under the Assignment of Error

After a final conviction in Texas, a new trial may not be filed after two days from the date of conviction, or for good cause before the adjournment of the term of the court. See: *Texas Code of Criminal Procedure, Article 755, as amended 1935.* The 51st Judicial District Court of Tom Green County, Texas, in which petitioner was tried and convicted (See: Printed Record, p. 1, in this Court in Case No. 232, October Term 1953, *Clark* v. *State.*), adjourned by operation of law May 30, 1953, some fifteen days after the judgment in this case. See: *Revised Statutes of Texas, 1925, Article 199,* as amended *1949.*

After June 1, 1952, there is no remedy in the Texas Criminal Practice by which the questions of due process as affecting the validity of the convicition could be raised, except by habeas corpus, unless they appeared of record in the trial and could be presented by appeal.

As stated in the petition for writ of certiorari, the common law writ of *coram nobis* and right to re-open a final conviction in criminal cases does not exist in Texas. See: *Ex parte Massey,* 249 S. W. (2) 599; and *Ex parte McCune,* 246 S. W. (2) 171.

Petitioner's only remedy in presenting his questions of due process was by habeas corpus, and he was required to proceed first in the state courts and pursue his remedy there. See: *Mooney* v. *Holohan, supra.*

By Article V, Sec. 5, of the *Constitution of Texas,* The Court of Criminal Appeals has original jurisdiction to grant writs of habeas corpus. Under the Texas Constitution, Article V, Sec. 8, the district courts also have original jurisdiction in habeas corpus. In 1943, Article 119, *Texas Code of Criminal Procedure,* was amended providing for

the place where writs should be returnable. After final conviction in any felony case, the writ of habeas corpus is now under the statute returnable to the Court of Criminal Appeals. If a district judge entertains a writ, he may hear the facts, but cannot grant final relief, but must make the writ returnable to the Court of Criminal Appeals. See: *Ex parte Benson*, 223 S. W. (2) 934; *Ex parte Montgomery*, 223 S. W. (2) 932; *Ex parte Clubb*, 234 S. W. (2) 874; and *Ex parte Oliver*, 240 S. W. (2) 316.

Petitioner presented his application originally to The Court of Criminal Appeals as he was entitled to, following the procedure outlined and approved by that Court in *Ex parte Johnson*, 224 S. W. (2) 240.

Article 122, *Texas Code of Criminal Procedure* provides that when an application for habeas corpus has been made to a judge, "he shall appoint a time when he will examine the cause of the applicant, and issue the writ returnable at that time. Article 113, of the *C. C. P.*, provides the writ shall be in the form of an order to respondent to appear and show cause why applicant is legally restrained. But the Court of Criminal Appeals has held (See: Ex parte Willis, 259 S. W. (2) 190) that it will not take evidence on original habeas corpus proceedings in absence of substantial allegations raising a question which would warant relief prayed for.

It is not thought that the last opinion can be construed to hold that the court will summarily refuse a writ of habeas corpus without giving applicant a right to be heard in argument on the law. In something over thirty years in the practice at the bar of Texas by the attorney who signs this petition for certiorari, it is first and only application for habeas corpus which he has filed in behalf of a client, where a court on presentation of the application has refused it without a hearing.

The action of the Court of Criminal Appeals can only be construed to mean that that Court considered the sworn allegations of the application as presenting no good faith grounds for relief.

The action of that Court presents to this Court the issue as to whether the facts set out in the application present a substantial question as to whether petitioner in his trial was denied his constitutional right of due process of law.

On Conduct of Counsel

Types of contingent fees taken by attorneys have been criticized at times, but it is a novel fee, the contingency of which is the conviction of the attorneys' client.

Defendant's attorneys in this case took a note and mortgage for $25,000.00 from their client, whom they contended was insane. In addition they took from him a transfer of the title to his automobile, and converted it. In addition they claimed a balance due from him of $4,500.00 on a fee in his uncontested divorce suit.

The only defense presented in his behalf was that he was insane. The only opportunity to collect the money claimed to be due them in the sum of $29,500.00 was to sell their client's hotel. If defendant was insane, their note and mortgage was invalid, and defendant was not competent to sell his hotel. Their only chance of collecting their money was for the jury to find the defendant sane and convict him.

Defendant's attorneys proceeded to negotiate with the special prosecutor to sell the defendant's interest in the hotel to the client of the special prosecutor, Bill Volkman, who was defendant's partner. Volkman, who wanted to purchase the hotel for an inadequate price, and could only

do so if defendant was found to be sane, testified as a witness for the state that in his opinion the defendant was of sound mind.

Defendant's attorneys made no effort to show bias on the part of Volkman or pecuniary interest. They did not seek a continuance nor change of venue, though the situation required it and the law authorized it. They made no effort to secure any creditable testimony to establish that defendant was insane, though a great preponderance of evidence was available to establish this fact. They did not have him examined by any doctor, mental expert or otherwise. They made no effort to obtain from Dr. Wilhelm the information that he had administered a heavy opiate to defendant a few hours before the homicide. They did not use numerous lay witnesses who would have testified to facts upon which they based an opinion that defendant was insane. They entered into an agreement with the prosecution to suppress the evidence of the serious misconduct of his deceased wife which had been responsible for defendant's condition. The facts show that the only psychiatrist who has examined defendant, did so after his conviction, and will and would have testified that in his opinion defendant was insane at the time of the homicide.

Defendant was convicted and given the death penalty. On the day of his conviction, when he was returned to jail, the attorneys by threats coerced defendant into signing a conveyance of his interest in the hotel to the client of the special prosecutor, who had testified against him on the trial.

The attorneys delivered the deed, took their $29,500.00, took off in defendant's automobile, and have made defendant no accounting, and he has not seen them since.

In addition his attorneys paid to the special prosecutor the sum of $15,000.00 out of the sale of the hotel in settle-

ment of a purported civil suit by the special prosecutor in behalf of the mother of the deceased.

If it can be said that the above facts do not conclusively establish lack of due process, then the least that can be said is that the opportunity existed for fraud and bad faith and wilful incompetency on the part of defendant's attorneys. And the result was that the attorneys were inexcusedly negligent and incompetent in the defense of the case, and did not even meet the minimum standards of effective aid of counsel.

In the case of *Avery* v. *Georgia*, 345 U. S. 559, 97 L. ed. 1244, a system was followed of using white cards for white jurors and yellow cards for negroes in the jury wheel. The judge drawing the jury panel testified that he did not discriminate in drawing the cards. But no negroes were selected on the jury. The Supreme Court was unanimous in reversing the case. Justice Frankfurter said:

"So far as the particular facts of this case was concerned, we may accept the testimony of the judge who drew the slips from the box as to the honesty of his purpose; *that testimony* does not refute the fact that there were opportunities to discriminate, as experience tells us there will inevitably be when such differentiating slips are used. . . . The stark resulting phenomena here was that . . . no negro got onto the panel of sixty jurors from which Avery's jury was selected. The mind of justice, not merely its eyes, would have to be blind to attribute such an occurrence to mere fortuity."

It may have been a mere coincidence in our case that the lawyers were working to collect their fee all during the trial, and could only succeed in collecting it if the defendant was convicted. It is conceivable that they could have been indifferent and would make an honest effort to have

him adjudged insane, even though they would not collect the money they claimed.

But they had a deep financial interest in defendant being convicted. The sale of his hotel interest and the collection of their money from the client of the special prosecutor, and state's witness, awaited the verdict of the jury. If defendant was convicted, the deal went through and attorneys got their money. If he was acquitted and found insane, the deal would fall through, and the attorneys would not get their money.

The attorneys made no reasonable effort to secure defendant's acquittal, and he was convicted and given the death penalty.

The opportunity for fraud and bad faith existed. No adequate defense was made by the attorneys. If it could be said they did not act deliberately, the opportunity was there, and the result was patent and the same.

The facts in this case clearly bring it under the rule of the following cases: *Glasser* v. *United States*, 315 U. S. 60, l. c. 76, 62 S. Ct. 457; *Johnson* v. *Zerbst*, 304 U. S. 458, 58 S. Ct. 1019, 82 L. ed. 1461; *United States* v. *Handy*, 203 Fed. (2) 407, l. c. 417; *McDonald* v. *Hudspeth*, 41 Fed. Supp. 182, reversed in *Hudspeth* v. *McDonald*, 120 Fed. (2) 962; *Tompsett* v. *Ohio*, 146 Fed. (2) 95, l. c. 98; *United States* v. *Bergamo*, 154 Fed. (2) 31; *Miller* v. *Hudspeth*, 176 Fed. (2) 111; *Diggs* v. *Welch*, 14 Fed. (2) 667; *United States* v. *Wight*, 176 Fed. (2) 376, l. c. 379; *United States* v. *Ragen*, 166 Fed. (2) 976, l. c. 980-981; *Butzman* v. *United States*, 205 Fed. (2) 343, l. c. 351; *United States* v. *Hack*, 205 Fed. (2) 723, l. c. 727; *Abraham* v. *State*, 228 Ind. 179, 91 N. E. (2) 358; *Miller* v. *Hudspeth*, 164 Kan. 688, 192 Pac. (2) 147, l. c. 162; *Sanchez* v. *State*, 199 Ind. 235, 157 N. E. 1; and many others.

Inefficiency of counsel alone is not sufficient to deny due process, but the acts of the counsel must either be so in-

effective as to constitute the trial a mockery and a farce; or it must be coupled with dishonesty, bad faith, fraud, or conflicting interest.

In the *Tompsett Case, supra,* it was pointed out that the alleged misconduct all appeared in open court and before the judge and defendant did not complain. In our case the dealings between defendant's counsel and the special prosecutor were outside the courtroom, and their fraud and bad faith was accompanied by the utter failure in the courtroom to present any defense at all. The Court says in the *Tompsett Case:*

"In that event if the attorney selected by such a defendant is so incompetent and dishonest or so improperly conducts defendant's case as to amount practically to no representation, the defendant is prejudiced and thereby deprived of a fair trial, a court should grant relief by use of a writ of habeas corpus."

The facts in the case of *Sanchez* v. *State,* 199 Ind. 235, 157 N. E. 1, are very similar to our case, and the court held the incompetency of counsel denied due process. In the *Sanchez Case* and the case of *Abraham* v. *State,* 228 Ind. 179, 91 N. E. (2) 358, the Supreme Court of Indiana held that there was no difference in the rule where the attorney was employed by the defendant or appointed by the court or employed by his family and friends.

In the *Sanchez Case* it appeared that the attorney did not contact the defendant's brother, did not summons available witnesses, and did not offer the testimony available which bore on defendant's case, or his reputation in the community.

There are two cases from the Fifth Circuit which are material here. In *Saunders* v. *United States,* 205 Fed. (2) 399, the Court reversed a trial court where the motion to vacate the judgment alleged that defendant was insane and incompetent to enter a plea without counsel. The

Court of Appeals directed the trial court to hear the motion on the facts. The opinion was by a unanimous court.

It is difficult to reconcile the opinion of that court with the opinion of the majority of the same court in the same volume in *Massey* v. *Moore,* 205 Fed. (2) 665. The majority in the latter case held that on habeas corpus the issue as to whether defendant was insane was a collateral attack on the judgment of conviction, and the issue was not relevant as to whether defendant had intelligently waived counsel upon the trial. It is thought that the opinion of the dissenting judge announces the sounder rule. The majority begs the question by arguing that the right to appointment of counsel in Texas is not part of due process in a non capital case. This is true. But a defendant is entitled to an attorney in every case, if he desires it and does not waive it. The material question is can a man who is insane waive his constitutional right to effective aid of counsel. The question of his sanity, as in the Saunders Case, is one of the issues he is entitled to try with effective aid of counsel.

An insane defendant ought not to be deprived of the right after conviction to show that he was not competent to judge the ability of his attorney either because he was insane, or because he was ignorant and illiterate as in the *Sanchez Case;* or because he was defrauded as in our case.

However, the majority in the *Massey Case* recognize the rule in our Clark Case. The Court says:

"Appellant does not point to any fact or thing showing that he had a defense and that he was unfairly deprived of it, or that he was otherwise not fairly tried, or even that there was any unfairness in the attitude of prosecutor or court. He rests his whole case upon the proposition raised long after trial that because, as he now claims, he was then of unsound mind, he could not be tried without counsel."

Petitioner submits that it is apparent from the sworn application that no substantial evidence was offered by his attorneys on the trial, though it was available, or could have been made available by medical examination. The defendant was ignorant of the dealings and negotiations of his attorneys with the prosecuting attorneys. He was in no position as a layman nor mentally to pass upon or judge the manner in which his attorney was conducting his trial. As a result the attorneys made no defense, defendant was convicted and given the death penalty. But for the lawyers, only their client had lost. They won. They collected their money from the state's witness, the client of the special prosecutor, and in order to collect their fee, they paid the special prosecutor out of the sale of defendant's property $15,000.00 in settlement of a civil suit which defendant did not know was pending.

The petitioner has asked The Court of Criminal Appeals of Texas to hear his story through the writ of habeas corpus. They have refused his plea without even the opportunity for a hearing.

He submits that his application presents a serious question of due process.

On Suppression of Testimony

The sworn application for habeas corpus shows that upon the trial of the main case it appeared that defendant contended he had no recollection at all of what occurred on the night of the homicide. The defendant's testimony on the main trial is printed in full in the Record in this Court in Cause No. 232, October Term 1953, *Clark* v. *Texas*, pp. 57-81). An examination of the cross examination by the Special Prosecutor, Mr. Upton, beginning on p. 66 of the Record and covering fifteen pages shows that the attorney was unable to develop from defendant a single recollection of what had occurred that night.

Defendant did not remember what had occurred. The reason was that Dr. Wilhelm a few hours before the homicide in defendant's room administered to him an opiate of high potency that made it impossible for defendant to have known what he was doing. Defendant and his attorneys had no knowledge of this. The attorneys made no effort to discover it. But the prosecution did know it, and suppressed the evidence. In addition the prosecution permitted the witness, Hankins, to testify that the visit of the doctor occurred two nights before the homicide, knowing this testimony to be false.

In addition the prosecution instructed the witness, Menchaca, not to disclose in his testimony that the visit of Dr. Wilhelm was on the night of the homicide.

The prosecution also suppressed a letter which the defendant had written his brother on the night of the homicide. No one but the prosecuting attorney knew, or knows, what was in that letter. But it is reasonable to assume that, if it was not exculpatory, the state would have offered it upon the trial.

The suppression of testimony, knowingly, by the prosecution, or knowingly permitting false testimony to go into the record, if it deprives defendant of a valid defense, violates the constitutional guarantee of due process of law. See: *Mooney* v. *Holohan, Warden, supra.*

In Texas if an offense is committed under the influence of a drug recently voluntarily taken by defendant, the evidence is material as mitigation of the offense. See: Article 36, *Texas Penal Code.*

But where the drug was administered as in this case by a doctor by way of treatment and produced a condition of temporary insanity, it would be a complete defense.

Dr. Polka, a specialist in mental diseases, who examined petitioner after his conviction at the request of present counsel, in his certificate (Exhibit "CC", R. 32) says:

"On the basis of good sound medical judgment, it is reasonable to believe that he had been temporarily deranged mentally and that he was blocked out for an unspecified time up to many hours following the administration of drugs referred to. (In this connection, it is common medical knowledge that given individuals are more susceptible to opiates than others and that varying results are obtained in different persons. It is also observed that in given cases, even small doses of opiates will produce mental derangement known as toxic psychosis (insanity) lasting for varying periods depending on the individuals, tolerance, and the size of the dose.

"On the basis of pertinent data shown by recorded statements, this examiner is justified in the belief that Clark was not responsible for his wrongful act on March 26, 1952, by reason of temporary insanity."

Petitioner submits that he was entitled upon his trial to have the evidence of the administering of the opiate submitted to jury on the issue of his mental condition at the time of the homicide. This evidence was withheld by the prosecuting attorney without knowledge of defendant and his attorneys, and as a result due process was denied him.

Conclusion

In the Conference of the Chief Justices—1952, 25 Government, No. 11, p. 249 (Nov. 1952), referred to in the concurring opinion of Justice Jackson in *Brown vs. Allen, supra,* (344 U. S., at p. 539), the chief complaint of the resolution adopted was that the district courts of the United States were usurping the functions of the state courts in habeas corpus proceedings which "could have been, presented in the original proceedings in the State Courts".

Yet The Court of Criminal Appeals of Texas, whose Presiding Judge attended said conference and subscribed

to that resolution, has refused petitioner a hearing on his habeas corpus in the State Court. The result is that, if this petition for certiorari is denied, the action of the highest Texas Court in refusing a hearing on the facts will have forced petitioner to seek his remedy in a federal district court, a result which the Chief Justices have decried. It cannot be assumed that the intention of the Chief Justices was that the federal courts should hold hands off in order that the state courts could deny parties summarily a hearing on their constitutional rights.

This petitioner is required under the rule of *Darr* v. *Burford*, supra, and *Brown* v. *Allen*, supra, to file this petition for writ of certiorari to the Supreme Court. In a case of this kind where no hearing on the facts has been had, and a hearing has been denied by the highest state court, this petition to the Supreme Court should not be a mere formality and a stepping stone to a federal district court. "Realistically" such "position is untenable", as said by Justice Jackson, concurring in *Brown* v. *Allen, supra,* (344 U. S., at p. 542.).

The Supreme Court should grant this petition for writ of certiorari and direct the progress of this case to proper and orderly channels, and should send the application for habeas corpus back to the State Court for hearing on the facts.

The writ of habeas corpus is the great writ of right in American and English Law, the corner stone of our liberties. It was the good fortune of attorney for petition to have the opportunity of hearing a great American, Hon. William Dawson, M. C., address a large meeting of his people and others in attorney's home city, on the difference between our country and totalitarian states.

When he was a boy in Georgia, he said, there was a politician who always ran for office upon a platform advocating sending the colored people back to Africa. When

this man would speak, all of the colored people would take to the woods and hide. But when he grew older, Mr. Dawson said, he was no longer afraid, because if the Congress, or the President, or anyone else, tried to do that to him, he would take them to court.

It is by the writ of habeas corpus that any citizen in our country may take his government to court.

Conceding abuses of the writ in recent years, it cannot be said that the petitioner in this case has abused it. As a humble and unfortunate supplicant, he went to the highest court of his state to have vouched safe to him his constitutional rights, and he was summarily denied a hearing. The well settled rule laid down by this Court requires him to present his Petition for Writ of Certiorari to this Court.

Petitioner submits that the Petition for Writ of Certiorari should be granted, and the judgment of The Court of Criminal Appeals of Texas in refusing the Application for Writ of Habeas Corpus without a hearing should be reversed, and that Court directed to entertain said application and hear the same on the facts presented.

Respectfully submitted,

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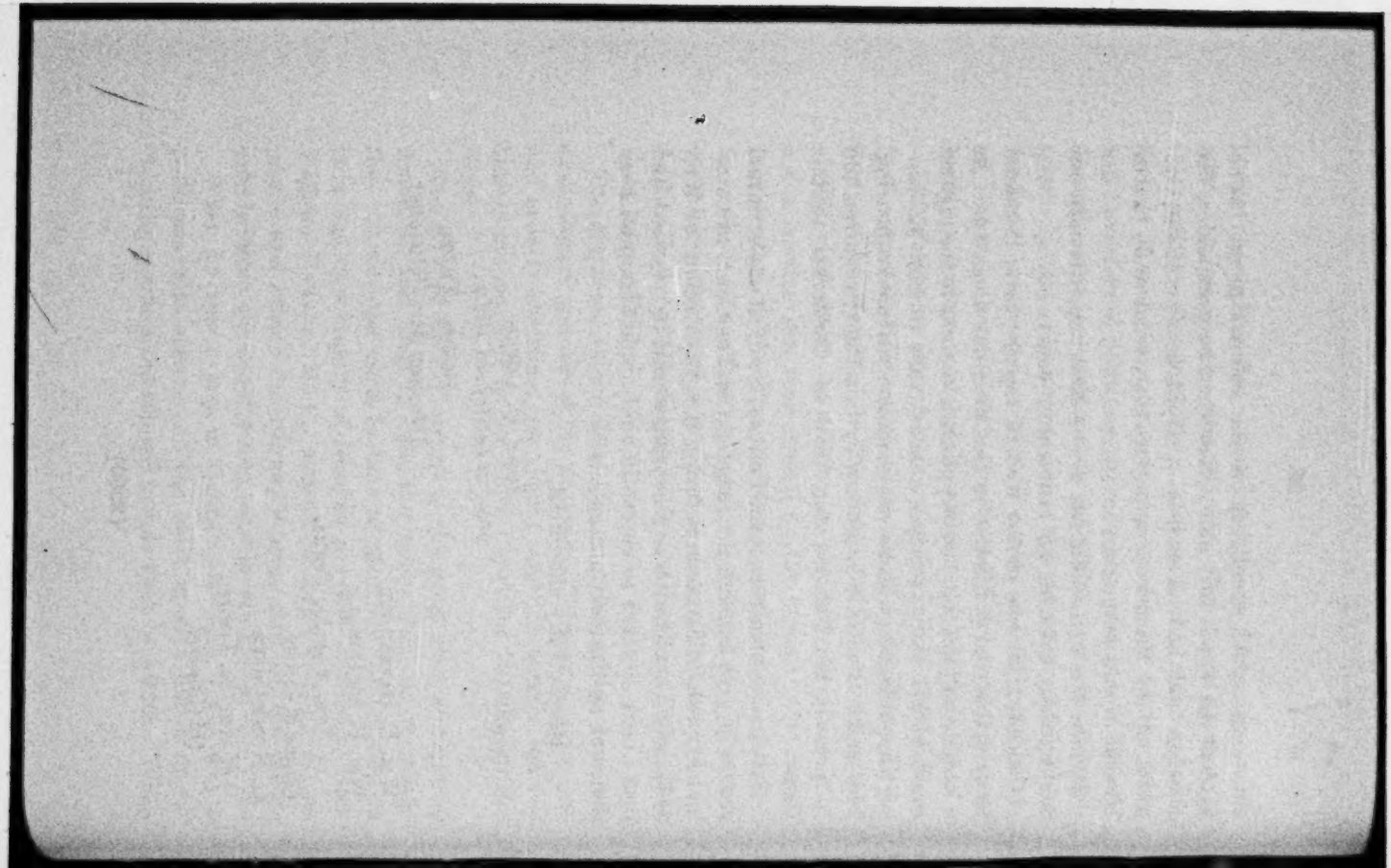

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Supreme Court of the United States

OCTOBER TERM, 1953

No. 549

EX PARTE CHARLES D. CLARK,
Relator

On the Relation of Colquitt Clark

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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Supreme Court of the United States

OCTOBER TERM, 1953

No. 549

EX PARTE CHARLES D. CLARK,
Relator

On the Relation of Colquitt Clark

Reply to Petition for Writ of Certiorari

To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

In reply to the petition for Writ of Certiorari to the Court of Criminal Appeals of Texas, your Respondent H. E. Moore, Warden of the State Penitentiary at Huntsville, Texas, respectfully shows:

This case has once before been presented to this Honorable Court on application for Writ of Certiorari (U. S. Supreme Court No. 232) by the same attorneys who have filed the instant petition. The former application was denied by this Court on October 19, 1953, with motion for rehearing overruled November 30, 1953. The questions now raised are substantially the same as presented

heretofore, both to this Honorable Court and to the Court of Criminal Appeals of Texas. Using collateral affidavits, which are inconsistent with the record in the trial court and employing unfounded and unjust premises and accusations, the Petitioner has twice filed applications for Habeas Corpus with the Court of Criminal Appeals of Texas, which were refused, and seeks to now get this Honorable Court to give consideration to his petition for review of the action of the Texas court.

There must be an end to a case. The Court of Criminal Appeals of Texas, thoroughly familiar with the record of the trial court and the defenses and contentions of Petitioner, and having been favored with very able arguments and briefs, found nothing new or of merit in the application for Writ of Habeas Corpus twice filed before it. Realizing this, but not wishing to lend credence to the unfounded statements in the petition before you now by silence on his part, your Respondent must, and will, challenge such of these statements, assumptions and premises as will readily point out to this Court the design of Petitioner herein in seeking the approval of this Court to a plan for delay.

The present attorneys for Petitioner did not try the case below. One of them, however, has been in the case commencing with the Motion for New Trial in the Disrtict Court of Tom Green County, Texas. The remaining two entered the case in the Court of Criminal Appeals at Austin, Texas, after judgment was affirmed. These attorneys apparently have not carefully studied the record and the facts pertinent thereto. In their zeal, these attorneys are accepting as true certain collateral affidavits, which will be

hereafter mentioned, and the affidavit of Petitioner's brother, Colquitt Clark. After only cursory study, this Court will note that these attorneys knew about, and have had in their possession, the affidavits attached because all of them were dated prior to the filing of Petitioner's first application for Writ of Certiorari to this Honorable Court. Now, for the first time, Petitioner makes allegations and assertions that are frivolous, flagrant, and untrue. The evidence of bad faith and delay is clear, as Respondent will demonstrate herein.

Statement

The petition herein involves three basic points:

(1) Petitioner in the instant application presents this Court, and presented the Court of Criminal Appeals of Texas, with a rehash of his previous complaint regarding the alleged incompetence of his trial attorneys.

(2) He next asks the Court to presume fraud on the part of the prosecution in the alleged supression of evidence, which will be conclusively demonstrated to be without support in fact.

(3) He finally says he was crazy at the time he murdered his wife and has been crazy at all times since that date. (R. p. 4.)

The Insanity Point

The insanity point of the instant application is referred to and answered first by Respondent because it

is the only one of the three possessing any superficial appearance of merit and it should be made clear that no Federal nor Constitutional question is presented in connection with the same, but that, on the contrary, there is an adequate remedy for Petitioner provided by State law which he has not involked and, in addition thereto, there is at least one other remedy which his present counsel, critical of the actions of all other members of the Bar involved in this case, have failed to utilize for the benefit of their so-called insane client.

Of course, the question as to insanity at the time of the homicide and at the time of trial has already been decided by a jury adversely to Petitioner and such question now appears to be foreclosed, since Petitioner's counsel have not yet gotten around to charging the jury with fraud. There remains the allegation of present insanity. Such a question could have been presented for adjudication in the District Court of Tom Green County, Texas, when he was sentenced by that Court on the 9th day of December 1953. (Petition, p ____ 3.)

Article 773(2) of the Texas Code of Criminal Procedure provides in part as follows:

> "Reasons to prevent sentence. Before pronouncing sentence in a case of a felony, the defendant shall be asked whether he has anything to say why the sentence should not be pronnounced against him. The only reasons which can be shown, on account of which sentence can not be pronounced, are:
>
> "2. That the defendant is insane; and, if sufficient proof be shown to satisfy the court

that the allegation is well founded, no sentence shall be pronounced. Where there is sufficient time left, a jury may be impaneled to try the issue. Where sufficient time does not remain, the court shall order the defendant to be confined safely until the next term of the court, and shall then cause a jury to be impaneled to try such issue."

It was not only present counsel's privilege, but their duty and responsibility, to stand up with Petitioner when he was asked whether he had any reason to offer why sentence should not be pronounced against him and to *then* assert his present insanity, if they had even a glimmer of hope that a jury would find him insane. Their failure to so act is eloquent testimony to the bad faith of the assertion of present insanity.

The procedure presently available for an orderly presentation of the contention of insanity is provided by Articles 821-32, inclusive, of the Code of Criminal Procedure of Texas, contained in Chapter 1, Title 12 of said Code, entitled "Insanity After Conviction." In substance the statute provided for a trial of the issue of insanity after the conviction for a crime in the Court where the judgment of conviction was rendered, but affidavit of insanity of the Defendant must be made by the "Superintendent of some State Institution for the treatment of the insane, or the affidavit of not less than two licensed and regularly practicing physicians of the State of Texas, or the affidavit of the prison physician or warden of the Penal Institution wherein the defendant is in prison,

or the County Health officer of the County where the defendant was finally convicted, which affidavits, if made, shall state that after a personal examination of the defendant, it is the opinion of the affiant that the defendant is insane, and said affidavit shall, in addition thereto, set forth the reasons and the cause or causes which have justified the opinion." (Article 922, C.C.P.) It is provided in Article 924 of the Code of Criminal Procedure that, "No special formality is necessary in conducting the proceedings authorized by this chapter. The Court shall see that the inquiry is so conducted as to lead to a satisfactory conclusion. The counsel for the defendant has the right to open and conclude the argument upon the trial of such issue of insanity."

For a man who is actually crazy, the procedure above set forth in the Code of Criminal Procedure provides a fair, simple and substantial remedy. For the faker who is grasping at straws in an effort to evade the consequence of his crime, the procedure poses the obvious disadvantages of (1) requiring affidavits of insanity by persons of substantial position and repute, (2) a jury of twelve men must become convinced of the condition of insanity and (3) the original sentence will be carried out, should the Defendant subsequently, after a further jury trial, be found to have been restored to sanity.

This Honorable Court, Respondent feels, will have no difficulty in appreciating the flimsiness of the lunacy contention and will relegate Petitioner to his simple recourse and procedure provided by the laws of the State of Texas for the assertion of such a contention.

II.
The Alleged Inadequacy of Petitioner's Original Attorneys

A substantial portion of Petitioner's brief and petition involves a critical analysis by his present attorneys of how his trial should have been conducted. Strangely enough, no complaint is made of the original briefing and presentation of the case on appeal by the same attorneys. Gifted with acute hindsight and faced with the necessity of fastening the blame for Petitioner's present plight upon someone, present counsel have asked this Honorable Court to try the original attorneys, using as evidence the collateral affidavits attached to the application for Writ of Habeas Corpus and the affidavit of Colquitt Clark, Petitioner's brother. Respondent and his counsel wish to say nothing in behalf of the trial counsel and have no interest in them one way or the other, except to note that they had a difficult case in which it is doubtful that present counsel could have obtained any better results. The way the trial was conducted by the original attorneys was attacked by present counsel in their second motion for rehearing filed in the Court of Criminal Appeals of Texas in every conceivable manner, but without success. They now complain principally of negligence, misconduct and actual fraud on the part of said attorneys, because of their alleged failure to avail themselves of testimony which would have established the defense of insanity. At the risk of unduly lenthening this reply, Respondent now invites the Court's attention to the material discrepancies between Petitioner's support-

ing affidavits on the question of available evidence of insanity and the testimony of the same affiants while under oath and before the trial jury, as disclosed by the stenographic transcript of the proceedings.

Affidavits were made by Vic Weber and wife attached to petition as Petitioner's Exhibit "L" and "M," in which it is stated that at one time at the Clark residence Mrs. Clark acted peculiar and that Chas. D. Clark was "crazy." Now this "fair weather" witness, Vic Weber, testified for Defendant at his trial and the following are excerpts from his cross examination (S. F. p. _____, R. 341, but omitted in printing record in No. 232):

"Q: You never saw him at any time that he didn't know right from wrong?
A: Not that I recall.
Q: You have known him quite a while?
A: Approximately three years.
Q: All right. Do you recall the conversation you had with him up in his room on the Tuesday before Wednesday morning when this happened?
A: Yes. I went up to his room; it was after dinner.
Q: You do recall that conversation?
A: Well, I try to remember the best I can.
Q: You remember going up there?
A: Yes.
Q: You remember talking to him about the property settlement, and so forth?
A: Yes.
Q: And he knew what he had got in the way of property settlement?
A: Yes.
Q: And he was satisfied about it?
A: That's right.

Q: And you asked him if it was satisfactory and he said it sure was?
A: That's right.
Q: And then did he talk about Mrs. Murchison?
A: Well, he did mention Mrs. Murchison.
Q: Didn't he say that she was the cause of the divorce?
A: That's right.
Q: And he was going to get even with her if it took every cent he had?
A: That's right.
Q: And he knew what he was talking about then, didn't he, Vic?
Mr. Martin: Object to that.
The Court: Sustain the objection.
Q: And you never saw him any time when he didn't know right from wrong?
A: No, sir.
A: No, sir.
Mr. Earl Smith: That is all."

Can any weight be given to the Weber affidavit after reading his testimony at the trial? Can a witness promiscuously change his evidence through sympathy, or other reasons, and hope for any consideration to be given thereto?

Although the affiant, Mary McBroome, states in Petitioner's Exhibit "N" that Charles D. Clark "was not responsible for his actions" and "would not in his right mind have committed the offense with which he is charged," she was asked the ultimate question upon trial and the question and her answer are hereafter set out (S. F. p. 181):

"Q: Did you observe him enough, closely enough to where you had formed any opinion with reference to his sanity or insanity at these times?

A: *No, I couldn't truthfully say so.* I know that he was very, very upset and not himself as I had known him." (Emphasis supplied.)

Petitioner's position before this Honorable Court is based primarily upon a specific false premise. The premise is the assumption that Charles D. Clark was insane before the act of homicide was committed, that he was insane from the time of the act until his trial, that he was insane during the trial and that he is now insane. Asserting that Petitioner is and was insane during all the pertinent times, present counsel have accused, criticized and challenged everyone and everything connected with his trial. Counsel who file this reply, as they pointed out to this Court before when the first petition for Writ of Certiorari was presented in this case, again point out that the defense of complete total and continuing insanity is of recent origin, in that, as disclosed by the record, present counsel did not adopt it in the Texas Courts, but on the contrary, relied upon the trial court defense of *temporary insanity*, which was asserted by Petitioner's original counsel.

The truth of the matter is that Petitioner voluntarily took the witness stand and stated that he didn't remember anything that happened that night, didn't remember shooting his ex-wife, didn't remember calling his lawyer, didn't remember disposing of the gun and didn't remember anything else about the night of the murder. He remembered everything that happened before and after, but he just couldn't remember what happened the night he killed his wife. He never claimed anything but "temporary insanity," and his testimony on such issue was con-

fined to the statement that, on the night of the murder, he "couldn't remember what happened." The jury heard his story, as well as other witnesses', disbelieved it and found him guilty.

III.

The Allegations of Suppression of Testimony by the State of Texas

Petitioner's application before the Court of Criminal Appeals of Texas and the petition filed in this Court contain allegations that the prosecution knowingly suppressed the testimony of the witnesses, S. M. Hankins, Tomas Menchaca and Dr. Jack Wilhelm. Such statements are challenged by Respondent and will be refuted herein. One of the principal accusations made by Petitioner is that "only a few hours before the homicide he, the said doctor, treated the defendant and gave him (defendant) an opiate which would have rendered defendant incapable of knowing what he was doing for approximately 48 hours." (Petition, p. 4.) Great stress is placed upon the alleged suppression of these supposed facts, but the allegations are wholly false and unsupported by the record, as Respondent will proceed to point out, asking the Court at the same time to bear in mind that Dr. Wilhelm and Mr. Hankins are defense witnesses.

(A.) The uncontradicted record discloses that on trial Dr. Wilhelm testified for the Defendant and excerpts from his testimony on cross examination (S. F. p. 141, R. p. 361, original in No. 232) are as follows:

"Q: How many times have you treated Charlie Clark?

A: That would be indefinite; I couldn't tell without the card.

Q: Approximately.

A: Approximately, oh, year and a half.

Q: Well, during that period 15 or 20 times?

A: More times than that, I presume.

Q: All right. And the last time was when?

A: *I think it was a few days before the tragedy.*

Q: All right. And on any of these occasions that you ever saw him there never was a time in your opinion as a physician or as a layman, for that matter, that he didn't know right from wrong, was there?

A: I don't know.

Q: Is that your signature (handing paper to witness)?

A: Sure is.

Q: It is the statement you gave, is it not, Doctor?

A: That is the statement I gave.

Q: All right, sir. In this statement didn't you tell us 'I would estimate that I treated Charlie Clark for colds or kidney ailment some fifteen or twenty times. I could look at my record and definitely tell the number of times, but this is my best judgment', and that, 'During all the times from the beginning of the time that I first knew Charlie Clark and during the times I treated him for colds or kidney ailment up to the last time I saw him, which was in the District Attorney's office on or about the night of the 26th day of March, I never did observe anything wrong with him other than the colds and the kidney ailment. I observed nothing wrong with the mind of Charlie Clark during all the occasions I saw him, and during all those times I was and am of the opinion that he was of sound mind based on my observations'.

Q: On April 2, 1952, did you sign this statement?

A: Yes, sir.

Q: And in that statement did you state that during all the time, that you have examined Charlie Clark some 15 or 20 times or more, that you never observed anything wrong with him other than colds or kidney ailment and further that you never observed anything wrong with the man, and further you were of the opinion and are of the opinion that he is of sound mind?

Q: That is your statement?

A: That is my statement.

Q: And it is correct?

A: Well, the statement that is made there was without reference—

Q: Is the statement correct as you gave it?

A: Yes, it was at the time.

Q: All right. You were of the opinion at that time that Charlie Clark was of sound mind then, is that right?

A: Yes, sir.

Q: Then you don't tell this jury now that he is not of sound mind, or any time you saw him that he wasn't of sound mind; you are not trying to tell the jury that?

A: No, but I wasn't with him.

Q: But any time you did examine him as a physician or any time you were with him you never saw him when he was not of sound mind, in your opinion?

A: That is right." (Emphasis supplied.)

On April 2, 1952, which was six days after the murder, and long prior to trial, the witness, Wilhelm, gave a statement to Earl W. Smith, District Attorney, which is attached hereto as Respondent's Exhibit "A"; and, subsequently, on January 7, 1954,

he executed an affidavit which is attached hereto as Respondent's Exhibit "B," in which he swears that he only administered normal and usual sedation to the Petitioner and that he had never prescribed treatment or medicine for Petitioner which would have "knocked him out" or had the effects upon him which Petitioner now alleges. This Honorable Court will readily see that when all the statements of Dr. Wilhelm are construed together, there is no basis for the accusation of Petitioner's attorneys as to the effects of the so-called opiate given him. Even Petitioner's Exhibit "D" will not support his assertions and insinuations. It is difficult for Respondent to conceive of a reason why Petitioner should boldly make such statements which are so easily susceptible to disproof; the affidavit of January 7, 1954, eliminates the question, and now to ask this Honorable Court to consider such assertions in view of the record is sheer mockery.

(B.) The witness S. N. Hankins testified at length for the defense upon trial (S. F. p. 113, R. in No. 232, p. 81) and we quote the following excerpts from his testimony on cross examination:

"Q: Now then, in response to what Mrs. Clark asked you to do, what did you do then?
A: I called Dr. Jack Wilhelm.
Q: After that, did Dr. Jack Wilhelm come to the hotel?
A: He did.
Q: And see Mr. Clark?
A: Yes.
Q: I see. *Now then, that was two days before this killing?*
A: Yes, sir.

Q: Isn't that right?
A: That is right." (Emphasis supplied.)

The testimony of the witness Dr. Jack Wilhelm and S. M. Hankins, which is quoted above, was their evidence under oath in Court before a trial jury. The details testified to were then fresh in their minds. The record and all of the Petitioner's affidavits do not disclose in any way the suppression by prosecution of any evidence.

(C.) Petitioner also contends that the prosecution instructed the witness, Thomas Menchaca, not to testify about Dr. Wilhelm's visit and treatment, nor to reveal it to Petitioner's counsel. This charge and insinuation is untrue and the record completely refutes it, in that when Thomas Menchaca had finished on direct examination, the District Attorney made the following statement in answer to a similar accusation by Defendant's trial attorneys (S. F. p. 33, R. p. ——).

"Mr. Earl W. Smith: This witness has been in the Court House all the time, and if that remark is made with the intention of saying that the State has kept the defendant from talking to the witness—I will tell you, Mr. Manchaca, to tell them anything they ask you, and I resent that remark and ask it to be stricken from the record."

What is it that the prosecution is supposed to have suppressed? The Clark divorce was granted March 25. The murder was committed that night at 2:00 A.M. on March 26. Dr. Wilhelm said he saw Petitioner "a few days before the tragedy." The witness Hankins affirmed the fact that he had called Dr.

Wilhelm two days before the killing. Hankins apparently remains firm as to his version of the facts, since Petitioner has not submitted an affidavit to the contrary from him. Dr. Wilhelm attempts to change his story by giving a statement that he visited Petitioner on the night of March 25. Doesn't it seem logical that he would have had his record, if any, at hand when he testified in open court, knowing that he would be subjected to cross examination? Be that as it may, Dr. Wilhelm in the final analysis says that he only administered average and normal treatment; that he never prescribed any treatment or prescribed anything "that would knock him out for 48 hours," as that would put him in condition so that he would not know what he was doing, and he positively asserts that he made no statement to the contrary to Colquitt Clark, the affiant and brother of Petitioner, or to anyone else. Even had Dr. Wilhelm testified on the stand that he visited Petitioner the night of the murder, what difference would it have made? Consistent with the facts disclosed by his affidavit, he never would have testified that Petitioner was "knocked out" or "wouldn't know what he was doing." The record shows that Petitioner was not knocked out. He knew very well how to call his lawyer and tell him what happened and then, on the advice of his lawyer, he knew to "get rid of the weapon." He was sufficiently in possession of his faculties to leave his hotel again and conceal the murder weapon, which has not yet been found. Regardless of Dr. Wilhelm's testimony in the particular in question, the result of this case would have been the same.

In much of the petition, the accusation has been made that one of the prosecuting attorneys dealt with and colluded with the Petitioner's attorneys before and during the District Court proceeding. Petitioner states that one of the special prosecutors represented his hotel partner, Bill Volkman, and that Petitioner's interest in the Golden Spur Hotel was sold to Volkman on terms and conditions unknown to him and that part of the proceeds were paid to the prosecutor in settlement of a purported suit for the mother of deceased, and Petitioner know nothing about it. These false and malicious assertions clearly show that the present attorneys do not have the facts at hand, nor have they examined the records in Tom Green County, Texas. The facts are that on May 16, 1952, (the trial ended May 15) the firm in which the special prosecutor, H. C. Upton, was a member, filed a suit for Joann Potts, a minor, (daughter of deceased), against Charles D. Clark for damages sustained from a gun shot wound inflicted on her by Charles D. Clark. A lis pendens notice was filed against the hotel to prevent Charles D. Clark from conveying his interest in the same, and to place said property beyond the reach of creditors, so that he could not respond in damages. This suit was Cause No. 20,572-A, in the District Court of Tom Green County, Texas, and was filed on May 16, 1952, and Petitioner's new attorneys say the Defendant knew nothing about this suit. A certificate is attached hereto from the District Clerk of Tom Green County, Texas, Respondent's Exhibit "E", showing that citation was duly issued and served on Charles D. Clark in the Tom Green County Jail on *May 16, 1952*, and, thereafter, in a settlement of this suit with the con-

sent and authority of Petitioner, the said Joann Potts received the sum of $15,000.00, and *not the special prosecutor as alleged.* The unwarranted inferences made by Petitioner's attorneys are wholly untrue and unjust.

There is nothing in the record to support the ex-parte allegations of Petitioner's attorneys on the $15,000.00 paid in settlement of the above suit, but since such allegations are made, Respondent has the right to reply thereto and state the facts.

This Court will see that the record will not support any inference of collusion or bad faith with regard to the sale of Petitioner's interest in the hotel business. What bearing this transaction had upon the trial or its outcome is hard to discern, but again, Respondent must refute the untrue inference cast by Petitioner and asks to do so by reference to Respondent's Exhibits "C" and "D" attached hereto, wherein the witness S. M. Hankins, perhaps Petitioner's strongest witness upon trial, has stated the facts concerning the sale of the hotel. In his affidavit, Mr. Hankins has clearly stated that this Petitioner was well advised of the terms of the sale and thoroughly understood the same and agreed thereto. Here again, the inferences and insinuations of Petitioner can not be, and are not, supported.

Authorities in Support of Reply

Petitioner's application for Writ of Habeas Corpus to the Court of Criminal Appeals of Texas was twice refused by that Court. Realizing that in order to be entitled to the relief of habeas corpus in the State court the Petitioner must show that his judgment of

conviction was void. *Ex Parte Oliver*, 240 S. W. (2) 316 and *Ex Parte Edwards*, 242 S. W. (2) 396, (both death penalties) the Texas Court of Criminal Appeals considered the sworn application of Colquitt Clark and the supporting affidavits attached thereto and found nothing of merit upon which to grant the Writ. The Texas Court was thoroughly familiar with the trial record and the testimony given and was aware that "the application for the Writ, although sworn to, is but a pleading and does not prove itself." *Ex Parte Ambrose*, 170 S. W. (2) 731 and *Ex Parte Bowers*, 98 S. W. (2) 191.

In effect, Petitioner has asked that this Honorable Court try the Texas Court. Such action has been previously criticized by Associate Justice Minton when he was a Judge of the United States Court of Appeals for the Seventh Circuit. In *United States vs. Ragen*, 166 Federal (2) 976, he stated:

> "There should not be a rigid formalism in habeas corpus proceedings in which courts are seeking the substance as to the violation of constitutional rights. But it must be remembered that habeas corpus is a collatoral attack by the courts of Federal jurisdiction invading the province of State jurisdictions, and the trial of the competency of counsel is only a phase of this collateral attack. To warrant such collateral investigations of the competency of counsel, the pleadings should lay a foundation therefor by proper *factual averments, and competent evidence must clearly support such averments.* We should not lose sight of the fact that the Federal courts are being used to invade the sovereign jurisdiction of the States, presumed to be competent to handle their own police affairs, as the

> Constitution recognized when the police power was left with the States. We are not super-legislatures or glorified parole boards. We as courts look only to violation of Federal Constitutional rights. When we condemn a State's exercise of its jurisdiction and hold that the exercise of its powers is not in accordance with due process, we are in effect trying the States. It is State action that is on trial, and a decent regard for the coordinate powers of the two governments requires that we give due process to the State. That is the reason that in habeas corpus cases the relator must first show that he has exhausted his State remedies to open the way for the Federal courts to try the State's exercise of its sovereign power. For after all, the States represent the people more intimately than the Federal Government.

Petitioner has refrained from citing any authority for his belief that he can use a petition for Writ of Certiorari to this Honorable Court as a means of trying the issue of his alleged insanity. Sincerely believing that he has shown by the above references to the record that the contention of complete insanity is wholly untenable in view of the facts in this case, Respondent does not seek to unduly lengthen this reply by answering thereto, but would refer this Court to the available remedies provided Petitioner by the provisions of the Code of Criminal Procedure of Texas, heretofore referred to.

Respondent knows not what was the trial strategy of the Petitioner's original attorneys, but he does say that they were the attorneys chosen by Petitioner and that they were the same attorneys employed by him in the past. They are also the same attorneys

who, together with one of present counsel, briefed and filed his original appeal to the Court of Criminal Appeals of Texas. Now Petitioner complains of his choice, solely because he has been convicted of a terrible crime.

Although citing *Tomsett vs. Ohio*, 146 Federal (2) 95, and quoting therefrom (Petition p. 25), Petitioner has failed to bring himself within the holding of that case. As stated above the original attorneys were chosen by Petitioner and he acquiesced in their tactics upon the trial and up until his conviction was affirmed. The record will not support Petitioner's allegations that he was completely unaware of the actions of the original attorneys. It will show that they tried a difficult case and appealed from the trial court's judgment, during all of which time, there was no complaint by Petitioner. Only upon the affirmance of his conviction were the original attorneys discharged and subjected to criticism. In the *Tomsett Case*, the Court stated language which we deem applicable to the instant case, this being:

> "A defendant cannot seemingly acquiesce in his attorney's defense of him or his lack of it and, after the trial has resulted adversely to defendant, obtain a new trial because of the incompetency, negligence, fraud or unskillfulness of his attorney."

The Courts of Appeals for both the Fifth and Third Circuits have written recent opinions involving the issue of the competency of an attorney selected by the accused and we refer briefly to the opinions. In *Andrews vs. Robertson et al*, 145 Fed-

eral (2) 101, Certiorari Denied, 65 Supreme Court 1013, 324 U.S. 874, the Petitioner for Habeas Corpus was assessed the death penalty upon a rape conviction. Judge Waller made this observation:

> "The State Court has no right under the Constitution, to deny a defendant the right to counsel of his own choosing. Such Court could not be put in error for proceeding to try a defendant when he was represented by such counsel, which is to say that that Court should not be put in error for doing that which it had no right to refuse to do, nor was it a denial of due process for the trial Court to appoint and tender to the defendant additional counsel to assist the regularly employed counsel of defendant's own selection.
>
> "*The Federal Court, in habeas Corpus proceedings, cannot set itself up as the admeasurer of the legal capacity of counsel of defendant's own selection in the trial of a case in the State Court to the end that the defendant may put his own counsel on trial after the end of his own trial has been reached.*
>
> "Conceding that defendant's counsel was inexperienced and incapable of adequately representing petitioner, *such inadequacy on her part presents to this Court no constitutional ground for interference with the State Court in this case.*" (Emphasis supplied.)

Judge Maris in *United States vs. Handy*, 203 Federal (2) 407, a case relied upon by Petitioner, stated as follows:

> "Here, however, there is no suggestion by the relator of anything more than that his counsel

made mistakes of judgment in not calling the relater to the witness stand in his own defense, in not calling witnesses to his past life and character, and in not subjecting him to a psychiatric examination. These were all questions of the type which trial counsel in criminal cases are continually called upon to meet and which they must decide under the pressure of the trial and in the light of their best judgment at the time. *The fact that after the event and in the light of all that has subsequently transpored other counsel now regard as wrong the decisions thus made by relator's trial counsel cannot be made the basis for convicting the state of a denial of due process.* For unless the trial judge had interrupted the trial to interrogate the relator's counsel as to the reasons for their decisions on trial strategy the judge could have had no possible basis for concluding that those decisions were ill advised. Moreover it might well be that such intervention by the trial judge in the management of the defense by the relator's counsel would itself have amounted to a denial of due process of law. For the effective assistance of counsel for one's defense involves the right of counsel and client to plan defense strategy in privacy and independently of interference or dictation by the court."

All attorneys are capable of committing errors upon trial and one Court has said, "Few trials are free from mistakes of counsel. How much these mistakes contributed to the result can never be measured. There are no tests by which it can be determined how many errors an attorney may make before his batting average becomes so low as to make his representation ineffective. The only standard for habeas

corpus is the presence or absence of judicial character in the procedings as a whole." *Diggs vs. Welch*, 148 Federal (2) 667, Certiorari Denied, 65 Supreme Court 1576 (325 U.S. 889).

Petitioner asks this Honorable Court to allow his present attorneys to retrospectively defend him against the charge of murder upon such premises and assumptions as they would make, valid or not. Such a request has no precedent and should be denied by this Honorable Court, for as has been stated, "it is not the function of appellate courts to retry cases upon the intangibles involved in evidence which might have been, but was not, introduced at the trial." *Morton vs. United States*, 147 Federal (2) 28, Certiorari Denied, 65 Supreme Court 1015 (324 U.S. 875).

The original of each of the Exhibits refered to herein is on file in the office of the Clerk of the Supreme Court of the United States.

Conclusion

WHEREFORE, Respondent prays that said petition for Writ of Certiorari be in all things denied.

Respectfully submitted,

JOHN BEN SHEPPERD
Attorney General of Texas

RUDY G. RICE
Assistant Attorney General

HORACE WIMBERLY Horace Wimberly
Assistant Attorney General
Attorneys for Respondent

H. C. UPTON
San Angelo, Texas
of Counsel

EXHIBITS

Respondent's Exhibit "A"

San Angelo, Texas
April 2, 1952

My name is Dr. Jack Wilhelm. I have lived at San Angelo for the past four years, and I am an osteopathic physician and surgeon. During the life time of Mrs. Charlie Clark I had treated Mrs. Charlie Clark one time after being released from the hospital after she had been involved in a wreck. Approximately some four or five times after that I called at the home of Mr. and Mrs. Clark and she also called at the office. My best recolletion is I saw Mrs. Clark for the first time some six or eight months ago.

I first met Charlie Clark probably one year to one and a half years ago. The first time I ever saw Charlie Clark was when I was called to the Golden Spur Hotel to see a patient. My best recollection is that some six months ago I treated Charlie Clark for bronchitis and throat infection. Charlie called me at my office first, then later I saw him at his residence. Since I first treated Charlie Clark, at different intervals I have treated him for colds and also treated him for some slight kidney trouble he had. I would estimate that I treated Charlie Clark for colds or kidney ailment some fifteen or twenty times. I could look at my record and definitely tell the number of times, but this is my best judgment.

During all the times from the beginning of the time that I first knew Charlie Clark and during the

times I treated him for colds or kidney ailment, up to the last time I saw him, which was in the District Attorney's office on or about the night of the 26th day of March, I never did observe anything wrong with him other than the colds and the kidney ailment. I observed nothing wrong with the mind of Charlie Clark during all the occasions I saw him, and during all those times I was and am of the opinion that he was of sound mind based on my observations.

s/ Dr. Jack Wilhelm

Respondent's Exhibit "B"

THE STATE OF TEXAS
COUNTY OF TOM GREEN

KNOW ALL MEN BY THESE PRESENTS:

BEFORE ME, the undersigned authority, on this day personally appeared DR. JACK WILHELM, who after being duly sworn, says:

I talked with Colquitt Clark and William E. Davenport in April, 1953 about my attending Charles D. Clark professionally and the treatment prescribed for him. I never told anyonethat any prescription given by me to Charles D. Clark would "knock him out for 48 hours." I never at any time prescribed any medicine nor administered any treatment to the said Charles D. Clark that would have such effect on him, but on the contrary, such prescription or treatments were only such as to have a tendency to cause rest and sleep and were only normal and usual.

WITNESS my hand this 7th day of January, A.D., 1954.

s/ Dr. Jack Wilhelm
(Dr. Jack Wilhelm)

SUBSCRIBED AND SWORN TO BEFORE ME, by the said Dr. Jack Wilhelm, on this 7th day of January, A.D., 1954.

s/ Lloyd Kerr
Notary Public in and for
(SEAL) Tom Green County, Texas

Respondent's Exhibit "C"

THE STATE OF TEXAS
COUNTY OF TOM GREEN

BEFORE ME, the undersigned authority, on this day personally appeared S. M. HANKINS, and who after being by me duly sworn, on oath, says:

I am well acquainted with Charles D. Clark and was working for him as manager of the Golden Spur Hotel, San Angelo, Texas, on March 26, 1952. I am well acquainted with Bill Volkman, his former partner. I testified as a witness for Charles D. Clark in his trial for murder of his ex-wife, LaVerne Clark, the jury assessing the death penalty on May 15, 1952. I was not asked to suppress any testimony by the District Attorney or any other attorney. I remember the sale of Charles D. Clark's interest in the Golden Spur Hotel, which was purchased by Bill Volkman. This sale was made and closed on May 16, 1952, the day following his conviction. There were no agreements or negotiations for the sale of said hotel during the trial of this case, other than Bill Volkman had stated he wanted the partnership dis-

solved and the property sold and the proceeds divided. Charles D. Clark agreed to sell his interest in said property to Bill Volkman and in my opinion the consideration was adequate, and more than the property would now bring. A statement of the closing figures was furnished Charles D. Clark, a copy of which he has, and cashier's check was delivered him by me, and I took his acknowledgment to the deed. which he told me to hold until checks delivered. The present attorneys of Charles D. Clark have seen copy of the closing figures. I handled this matter at the request of Charles D. Clark. I took his acknowledgment to the deed and he thoroughly understood the transaction. I visited him frequently at the jail thereafter and attended to the details of winding up the partnership.

WITNESS my hand this 6th day of January, A.D., 1954.

s/ S. M. Hankins
(S. M. Hankins)

SWORN AND SUBSCRIBED BEFORE ME, by the said S. M. HANKINS, on this *8th* day of January, A.D., 1954.

s/ Helen B. Joplin
Notary Public,
SEAL Tom Green County, Texas

Respondent's Exhibit "D"

THE STATE OF TEXAS
COUNTY OF TOM GREEN

I, J. RAMON JONES, County Clerk of Tom Green County, Texas, certify that a deed from

Charles D. Clark to Wm. F. Volkmann, conveying an undivided one-half interest in and to the Golden Spur Hotel property, being the West Sseventy-Five Feet (W. 75') of Lost Five (5) and the South Ten Feet (S. 10') of the West Seventy-Five Feet (W. 75_) of Los Six (6), Block Eight (8), Main Part of the City of San Angelo, Tom Green County, Texas, is dated May 16, 1952, and acknowledged on May 16, 1952, before S. M. Hankins, Notary Public, Tom Green County, Texas, which said deed was filed for record on May 17, 1952, and is recorded in Volume 323, Pages 89-90 of the Deed Records of Tom Green County, Texas.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, This the 11th day of January, 1954.

s/ J. Ramon Jones
County Clerk,
SEAL Tom Green County, Texas

Respondent's Exhibit "E"

Certificate of Facts

THE STATE OF TEXAS
COUNTY OF TOM GREEN

IN THE 51st DISTRICT COURT
OF
TOM GREEN COUNTY, TEXAS

JOANN POTTS, a minor, by Next Friend — PLAINTIFF

VS. *NO. 20,572-A*

CHARLES D. CLARK — DEFENDANT

Suit Filed :	May 16th, 1952
Citation Issued :	May 16th, 1952
Service of Citation: Sheriff's return shows citation delivered in person to Charles D. Clark, with copy of petition attached thereto	May 16th, 1952
Suit Dismissed :	May 16th ,1952.

I, H. A. Goodson, Clerk of the District Courts of Tom Green County, Texas, do hereby certify that the above and foregoing facts are true and correct, according to the records of my said office.

Given under my hand and seal of office at San Angelo, Texas, this the 5th day of January, A.D., 1954.

s/ Horace A. Goodson
H. A. Goodson, Clerk of District Courts of Tom Green County, Texas.